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No. 88-——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CITY OF RIVERTON, WYOMING, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,
Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

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September 21, 1988

QUESTIONS PRESENTED

The questions presented are:

1. When Congress has directed that water rights for the Reservation be obtained under state law, does this Court's decision in *United States v. New Mexico* prohibit the implication of a Federal reserved water right which will significantly diminish the previously-awarded state water rights of non-Indian water users?

2. May land be classified as practicably irrigable when it is identified for inclusion in future irrigation projects which are economically infeasible under the discount rate required by law for application to Federally-funded water projects?

3. May a non-Indian successor to an individual indian's allotment within the Reservation maintain the portion of the Reservation's reserved water right attributed to his allotment without a showing of continuous beneficial use of the water right since the time of acquisition?

4. Is the United States estopped from claiming a Federal reserved water right to the severe detriment of water rights of non-Indians when the United States' induced non-Indian settlement with a promise of non-Indian access to water under state law and required that water rights for the Reservation also be obtained under state law?

LIST OF PARTIES

The parties to the proceedings below are as set forth in the State of Wyoming's Petition for Writ of Certiorari dated August 19, 1988 ("Wyoming Petition"), at ii.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

The cross-petitioners[1] respectfully request that a writ of certiorari issue to review the judgment of the Wyoming Supreme Court entered on February 24, 1988.

OPINIONS BELOW

The opinions below are referenced in the Wyoming Petition, at 1. They are accurately reproduced at Wyoming Petition Appendices A through I upon which these cross-petitioners rely.

JURISDICTION

The decision of the Wyoming Supreme Court was rendered on February 24, 1988, affirming in part and reversing in part the amended judgment and decree of the state district court, and remanding the matter for further proceedings consistent with the opinion. The Wyo-

[1] This cross-petition is filed by the following parties below:

Represented by Donald P. White: City of Riverton, Wyoming; Riverton Valley Irrigation District and Midvale Irrigation District.

Represented by C. Edward Webster, II: Owl Creek Irrigation District.

Represented by Ruth Clare Yonkee: Red Lane Improvement District; Town of East Thermopolis, Wyoming; Black Butte Livestock Company, Campbell's Incorporated; and the following individual appellants: Kenneth Ward Crandall, Phyllis L. Crandall, Barbara J. Daniels, Billy M. Daniels, Carl Dockery, Carol Dockery, Clyde R. Fisher, Gloria A. Fisher, Charles Goldben, Ogla J. Harvey, Robert W. Harvey, Brenda Joyce Kellogg, Gary V. Kellogg, William A. Matthews, Arthur D. McCumber, Marvin W. Meyer, Ernestine S. Meyer, C. Duane Rush, Kathryn C. Rush, Brian F. Sanford, Kathleen Sanford, Norman L. Sanford, Barbara Smith, Robert Stewart, Delores J. Weese, Raymond C. Weese, Ruth Clare Yonkee, *pro se*.

Counsel for cross-petitioners received the Wyoming Petition as follows: Mr. White, August 22, 1988; Mr. Webster, August 23, 1988; Ms. Yonkee, August 23, 1988. In compliance with Rule 19.5 of this Court, this cross-petition is filed within 30 days of August 22, 1988.

ming Supreme Court denied timely petitions for rehearing on April 22, 1988. This Court's Order Extending Time to File Petition for Writ of Certiorari to August 20, 1988, was entered in A-14 on July 7, 1988. The jurisdiction of this Court to review the judgment of the Wyoming Supreme Court is invoked under 28 U.S.C. § 1257 (3). The finality of the Wyoming Supreme Court's judgment was described by the Wyoming Petition in the Statement of the Case, at note 7, and the accompanying text. This Cross-Petition is filed pursuant to Rule 19.5 of the rules of this Court.

TREATY, STATUTES AND ORDERS INVOLVED

The treaty, statutes, and orders involved in this case are fully set forth in the Wyoming Petition, at 2-3.

STATEMENT OF THE CASE

The cross-petitioners adopt and endorse the Statement of the Case contained in the Wyoming Petition. It is supplemented here only as is pertinent to the issues raised by these cross-petitioners.

Description of the Cross-Petitioning Parties

The parties to this cross-petition are identified in footnote 1, above. Each of these parties is a water user under authority of Wyoming law within Wyoming Water Division No. 3, which is coterminous with the Big Horn River Basin. For example, the Midvale Irrigation District encompasses approximately 73,000 acres of irrigated land operated by approximately 650 irrigators within the federally funded Riverton Reclamation Project, which itself is entirely within the ceded portion of the Wind River Indian Reservation ("Reservation").

The individual cross-petitioners are farmers and ranchers owning lands in the Big Horn River Basin. Some of these individuals are also members of Riverton Valley Irrigation District, Owl Creek Irrigation District, or other corporate cross-petitioners.

Not all incorporated parties are irrigators. The City of Riverton, Wyoming, for example, is an incorporated municipality located within the Reservation at the point at which the Wind River and the Popo Agie River flow together to form the Big Horn River. *See* Wyoming Petition, Exhibit A. Riverton supplies its approximately 10,000 inhabitants with water relying upon water rights obtained under Wyoming law.

History of Irrigation Development in the Big Horn Basin

The Big Horn Basin bears a long and proud history of irrigation development testifying to the hardiness of the pioneers who came to the basin to participate in the development of the dry western reaches of the United States.

The first settlers came to what was later to become the State of Wyoming in the early 1800's. Wyo. Ex. WRIR PW-2. By the 1860's, a sufficient number of settlers had come to the area to merit the establishment of a reservation for the Shoshone Tribe of Indians and, by 1868, the exterior boundaries of the Reservation were quite similar to those existing today. Wyo. Ex. WRIR PW-2, pp. 162-165.

Development of lands within the the Big Horn Basin was induced by various land disposal acts passed by Congress between 1820 and 1930, which resulted from Congress' recognition that settlement and subsequent development of the vast western public lands would not proceed unless legislation were passed favoring that settlement. Wyo. Ex. WRIR MV-11; Tr. 10510. Within the Big Horn Basin, public lands were disposed of under the Cash Entry Act, the State Selection Act, the Homestead Act, the Stock Raising Homestead Act, the Mining Act, the Desert Land Act, the Carey Act and the Reclamation Act.[2] Because water rights did not accompany a land

[2] *See* Wyoming Petition App. F, at 259a-260a, Findings of Fact, 106-111; Wyoming Petition App. H, at 688a-689a, Findings of Fact I.3. through I.6.

patent established under any of the disposition acts, it was the responsibility of the settlers seeking patents under the disposition acts to initiate their own water rights under state law.[3] In the case of several of these acts, no patent would be granted until water rights were obtained[4]

By the mid-1880's, settlement of the basin was proceeding apace and small communities had been established. Wyo. Ex. WRIR SF-1, Appendix B; Defendant's Ex. Deaver-Wilkwood-Elk No. 13, at 1. Accompanying development of the new communities was settlement of the surrounding lands by farmers and ranchers. As typically happened throughout the west, the earliest settlers obtained the most easily irrigable lands. Wyo. Ex. PW-2, at 224-242; Wyo. Ex. SF-1, Appendix B at 8. Later settlers moved into the interior valleys of the basin, necessitating the construction of large irrigation projects to supply water to the newly-settled lands. *Id.* As early as 1904, President Theodore Roosevelt authorized construction of the Shoshone Reclamation Project, an effort spanning over 50 years and ultimately resulting in the development of over 90,000 acres of irrigated lands in the basin. Defendant's Ex. Deaver-Wilkwood-Elk No. 13, at 1. In 1905, the Governor of Wyoming initiated a survey of lands within the Wind River Basin which were formerly a part of the Reservation but which were ceded to the United States by the Act of March 3, 1905, 33 Stat. 1016 ("1905 Act"). Wyo. Ex. WRIR PW-2, at 226. The survey set out approximately 335,000 acres of land as

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[3] It is established by the decisions of this court that settlers on the public lands under the various disposition acts acquired no water rights, but that Congress intended to make available waters on the public lands for appropriation under the laws of the states and territories of the western United States. *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955).

[4] *See* 1891 Amendment to Desert Lands Act, March 3, 1891, 26 Stat. 1096, § 5, Wyo. Ex. WRIR DS-13; Carey Act of 1894, 28 Stat. 422, at 422-423, § 4, Wyo. Ex. WRIR DS-17; Reclamation Act of 1902, 32 Stat. 388, at 389, § 5, Wyo. Ex. WRIR DS-21.

potentially irrigable and secured all of the remaining water rights for the Wind River drainage, essentially determining the boundaries for what would later become the Riverton Irrigation Project. *Id.*

As a consequence of these efforts, and thousands like them, present non-Indian irrigation within Water Division 3, Wyoming, all of which proceeds under water rights obtained under Wyoming law, comprises approximately 550,000 acres, of which 120,000 acres are within the exterior boundaries of the Reservation. No non-Indian water right has a priority earlier than the 1868 priority awarded by the Wyoming Supreme Court for the reserved water right in this case.

Acquisition of Reservation Water Rights Under the 1905 Act

At the same time as non-Indian settlers in the Big Horn Basin were acquiring water rights under Wyoming law, so too was the United States on behalf of the Reservation. The 1905 Act and the acquisition of state water rights for the Reservation were discussed in detail in the Wyoming Petition, at 5-6 and 12-18. For purposes of this cross-petition, it is sufficient to note that, under the Water Proviso of the 1905 Act, Article III, Congress required that water rights for the Reservation be obtained in accordance with Wyoming law. Responding to Congress' direction, the United States obtained permits to irrigate 145,000 acres of Reservation lands. While, due to the inaction of the United States in maintaining those permits since 1963, only 87,000 acres remain under valid permits today, those which have expired may be reinstated upon application of the United States to the Wyoming State Engineer. Prior to the announcement of *Winters v. United States*, 207 U.S. 563 (1908), no assertion was made that the water rights of the Reservation could be secured other than by reliance upon Wyoming law and it was not until after this Court's decision in *Arizona v. California*, 373 U.S. 546 (1963), that the Indian Service neglected to extend the permits obtained under the 1905 Act.

Quantification of the Reserved Right

In spite of the 1905 Act's express deference to Wyoming law, the Wyoming Supreme Court quantified a Federal reserved water right with an 1868 priority on behalf of the Reservation for some 500,000 acre-feet of water for use upon approximately 100,000 acres of land held in trust or by individual Indians within the current boundaries of the Reservation. Wyoming Petition, at 8-10. Of this amount, 290,490 acre-feet were for 54,221 acres of land found to have been historically irrigated, while 209,930 acre-feet were for 48,520 acres of future projects. Wyoming Petition, at notes 26 and 27, and accompanying text.[5]

Effect of the Decision Below Upon State-Awarded Water Rights

The adverse effect of quantification of the Reservation's reserved water right was well documented below. The master devoted 12 findings of fact specifically to the effect of quantification of an 1868 Federal reserved water right upon pre-existing state-awarded water rights.[6] In

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[5] The reserved water right awarded is disporportionate to the Basin's Indian population and to the Indians' historic water use on the Reservation. At the time of trial, the tribal enrollment on the Reservation was approximately 5,200, Tr. 407, while the non-Indian population of the Basin was over 100,000. Yet, while the Indian population is less than 5% of the Basin's total, the reserved right was quantified to serve approximately 15% of the Basin's total irrigated acreage. Furthermore, the total reserved water right awarded was nearly double the historic use attributed to the Indians below after over 100 years of irrigation development on the Reservation. Since the total historic acreage includes much land shown to have been irrigated for one season only—and which was not shown still to be irrigated at the time of trial—the disproportion is in reality more than double.

[6] Wyoming Petition App. H. at 688a-690a. *See also id.* at 629a-630a. Among his findings, the master included that Congress intended and approved the appropriation system for Wyoming but that "today owners of water rights in Division 3 may suffer damages from an inability to put their rights to full use following the emplacement of an 1868 priority date for the Indians in the upper

order to soften the effect of the reserved right,[7] the master limited development of the future projects' portion of the reserved water right to no more than 10% of the total reserved right in each decade following the decree, unless storage facilities were in place to provide all water necessary for Indian and non-Indian users. Wyoming Petition App. H. at 584a, 626a-627a.

The district court originally agreed with the master's conclusion that state-awarded water right users would be damaged by the reserved water right and so found. Wyoming Petition App. F, at 258a, Finding of Fact 98. On this basis, the district court ruled that upstream storage would be required to be in place to provide water for the additional acreage of each of the five future projects before *any* construction of the project could begin. Wyoming Petition App. F, at 236. Finding of fact 98 and the storage requirement were, however, deleted by a subsequently-assigned different district judge who heard no additional evidence on the injury question.[8]

A closely divided Wyoming Supreme Court (3-2) rejected the storage limitation developed by the master and the district court. Wyoming Petition App. A, at 71a. The court opined that the storage requirement was inconsistent with the object of the reserved water right which it described as a prior entitlement to the waters

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reaches of the Wind River." Wyoming Petition App. H. at 688a, Finding of Fact I.2.

[7] The master, while recognizing the injustice of his decision upon non-Indian users, seemed to believe himself powerless to limit quantification of the reserved right due to injury to state-awarded water rights. The master thought that doing so would "be the imposition of a second wrong to atone for the first." Wyoming Petition App. H, at 626a.

[8] This case was begun in January, 1977, in the Big Horn Basin. At that time, District Judge Joffe was assigned the case and appointed Master Roncalio. Judge Joffe presided over the case until retiring shortly after issuing his opinion. District Judge Johnson was subsequently assigned the case and heard only the various post-trial, pre-appeal motions of the parties.

of the Reservation. *Id.* The dissent, however, would have gone beyond the protection offered by the storage requirement and denied the Federal reserved water right for the claimed future projects. Wyoming Petition App. A, at 84a.

In spite of the fact that the future projects remain unbuilt, recent pertinent developments demonstrate that the damage to state-awarded water rights predicted by the master and the district court has already begun to be felt. The Bureau of Indian Affairs ("BIA") has ordered that, as between Indian and non-Indian water users on the same irrigation project within the Reservation, the demands of the 1868 Indian reserved right are to be met first before any water will be distributed to junior non-Indian water rights on the project. The perhaps inevitable conflict ensuing from this decision has resulted in litigation, as a part of this adjudication, by non-Indian users on the irrigation project to foreclose the BIA's actions.[9]

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[9] The conflict has arisen in what is known as the Crowheart Area of the Reservation and, more specifically, in that area south of the Wind River within the diminished reservation. The water in question is delivered through the Wind River Irrigation Project, a Federal irrigation project serving Indians and non-Indians. On August 2, 1988, the superintendent of the Wind River Agency, having control of the operation of the Wind River Irrigation Project, issued his guideline that the demands of the 1868 reserved water right would be met before any water would be delivered to junior non-Indian rights of the project. *See* Cross-Petitioners' App. A. A few weeks earlier, however, the policy had already been placed into action when non-Indian users on the project, who are successors to Indian allottees, were informed by BIA officials that demands of Indian users would be satisfied first. Cross-Petitioners' App. B, at 2a, 7a, 9a. These non-Indian water users on the Reservation filed a petition in civil action no. 4993, which is this general adjudication below, for a temporary restraining order against the actions of the BIA. Cross-Petitioners' App. B, at 2a, *et seq.* The petition was denied. It should be noted that the non-Indian users on the Wind River Project, and the other Federal irrigation projects within the Reservation, though they now suffer from the junior status, are financially responsible for at least, if not more than, their *pro rata*

REASONS FOR GRANTING THE WRIT

The State of Wyoming has already brought to this Court's attention three important reasons for which its petition should be granted. These cross-petitioners fully support the Wyoming Petition and would demonstrate four additional bases [10] upon which the Wyoming Supreme Court's decision ignores or misapplies the decisions of this Court, is in conflict with the decisions of the circuit courts of appeal, or fails to consider acts of Congress pertinent to the quantification of the reserved water right

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portion of annual operation and maintenance of the Project. It should also be noted that the Federal irrigation projects were built under permits obtained from the State of Wyoming under the 1905 Act, in conformity with state law, and that prior to 1988, Indian and non-Indian users were treated as having equal priority on the projects.

[10] Following the filing of claims by the United States and Tribes, the State of Wyoming and the cross-petitioners asserted: (1) that the quantification of a Federal reserved water right which will significantly diminish the previously-awarded water rights of non-Indian water users is prohibited when Congress has directed that water rights for the Reservation be obtained under state law (Question 1, herein) Wyoming Petition, App. H, at pp. 404a, ¶ 2, 402a, ¶ 1, 431a, 436a-7a; (2) that land may not be classified as practicably irrigable when it is identified for inclusion in future irrigation projects which are economically infeasible under the discount rate required by law for application to Federally-funded water projects (Question 2, herein) Wyoming Petition, App. H, at pp. 404a, ¶ 3, 405a, 545a, 575a; and (3) that a non-Indian successor to an individual Indian's allotment within the Reservation may not maintain a portion of the reserved water right attributed to his allotment without a showing of continuous beneficial use of the water right since the time of acquisition (Question 3, herein), Wyoming Petition, App. H, at pp. 406a, ¶ 10, 420a, *et seq.*, *see also* Brief of Appellee State of Wyoming (type 3 claims), pp. 29 *et seq.*; (4) that the United States is estopped from claiming a Federal reserved water right for the Reservation, to the detriment of the water rights of non-Indians when the United States' induced non-Indian settlement of the Big Horn Basin, with a promise of access to water under state law for all beneficial purposes, and required that water rights for the Reservation be obtained under state law (Question 4, herein) Wyoming Petition, App. H, at pp. 623a *et seq.*, *see also* Wyoming Petition, App. A, at pp. 22a and 23a.

on the Reservation. Because of the importance of these questions in the adjudication of Federal reserved water rights throughout the western states, this Court should grant certiorari on these issues to clarify the application of the Federal reserved water right doctrine and to provide the protection to which state and private water right users are entitled under the decisions and laws of the United States.

It should be noted that the reasons described by this cross-petition generally address limitations upon the reserved water right awarded below. These cross-petitioners, however, wish to make it clear that their presentation of these reasons does not diminish their support for Wyoming's contention that Congress expressly intended that water rights for the Reservation be obtained under the laws of Wyoming.

I. Because The Federal Reserved Water Right For The Reservation Will Significantly Diminish Previously-Awarded State Water Rights Of Non-Indian Users And Because Congress Has Directed That Water Rights For The Reservation Be Obtained Under State Law, The Wyoming Supreme Court's Failure To Circumscribe The Effect Of Its Quantification Upon Non-Indian Users Is In Conflict With This Court's Decision In *United States v. New Mexico.*

By the 1905 Act, Congress directed that water rights for the Reservation be obtained in strict accordance with Wyoming law. Permits to irrigate 145,000 acres of Reservation lands were thereafter acquired. Acting in disregard of this historical precedent, the Wyoming Supreme Court quantified a vast reserved water right which replaced those Wyoming water rights acquired under the 1905 Act and which will, as a result, severely damage the water rights of these cross-petitioners and others similarly situated. In so doing, the Wyoming Supreme Court ignored this Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978), which instructs that the quantification of a Federal reserved water right must be

sensitive not only to Congress' policy of deference to state water law, but also to the rights of state and private water users who are the victims of the quantification. This Court should accept certiorari to apply its decision in *United States v. New Mexico*, and thereby to protect state and private water users in the Big Horn Basin from a gallon for gallon reduction in their water rights, and to rescue the 1905 Act from the dustbin of history.

In *New Mexico*, this Court insured that the implication of a Federal reserved water right would not destroy the hard-won water rights of water-needy state and private appropriators. Reaffirming and relying upon its previous decisions,[11] this Court demanded a careful examination

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[11] These cross-petitioners believe that *New Mexico* is properly read as one in a series of cases by which this Court, while reaffirming Congress' power to imply a reserved water right, has sought more carefully to restrict a reserved right doctrine which was threatening to destroy state sovereignty over water rights. Initially, this Court made it clear that, under ordinary circumstances, the state courts have jurisdiction to adjudicate both Indian and non-Indian reserved water rights. *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); *United States v. District Court In and For the County of Eagle*, 401 U.S. 520 (1971). In *Cappaert v. United States*, 426 U.S. 128, this Court addressed the substance of the reserved water right doctrine and made it clear that quantification of a reserved water right would be restricted to the United States' minimum needs. *Cappaert* was closely followed by *United States v. New Mexico*, which reapplied the *Cappaert* minimal needs test, and, recognizing that even under those circumstances a gallon-for-gallon reduction in the amount of water available for state and private appropriators might result from the quantification of a reserved right, held that any such reduction would be weighed in determining what, if any, water had been reserved. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), a fishing rights case, affirmed that Indian reserved rights must not monopolize a natural resource, but be sufficient only to provide the Indians with a moderate living. Finally, in *Arizona v. California*, 460 U.S. 605 (1983), this Court questioned whether the expansive quantification of Indian reserved water rights based upon practicably irrigable acreage would automatically be applied for all Indian reservations.

of the need and purpose of a claimed Federal reserved water right. *New Mexico*, 438 U.S. at 700. This examination is required both because a reserved right is normally created by implication and because of the history of congressional deference to state law in the field of federal-state jurisdiction respecting the allocation of water.[12] *Id.* at 701-702. Relying upon these stark realities, and acknowledging that the quantification of Federal reserved water rights can wreak havoc upon long-established state economies dependent upon state-awarded water rights, this Court stated that the damage resulting to state-awarded water rights "must be weighed in determining what, if any, water Congress reserved for use" on behalf of a reservation. *New Mexico*, 438 U.S. at 705.

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[12] That the reserved right doctrine should be applied sensitively to the needs of state and private appropriators had, with remarkable foresight, been recommended to Congress by Porter J. Preston and C. A. Engle, engineers for Bureau of Reclamation and Bureau of Indian Affairs, respectively, in their report of June 8, 1928. Preston and Engle, *Report of Advisers on Irrigation on Indian Reservations*, June 8, 1928, *reprinted in Survey of Conditions of the Indians in the United States, Hearings Before a Subcommittee on the Committee on Indian Affairs*, United States Senate, 71st Cong., 2d Sess., Part 6, 11/21/30. Among the recommendations in the lengthy report, Messrs. Preston and Engle suggested that the laws of the states in which Indian reservations are situated be complied with in the acquisition and protection of water rights if doing so could be accomplished without jeopardizing the rights of the Indians. *Id.* at 2213. Messrs. Preston and Engle, like this Court in *New Mexico*, recognized the force of the *Winters* decision, but recommended to Congress "that in all cases where the application of this principle would result in the loss of water rights regularly acquired by appropriation and beneficial use, and in consequence considered valid under state laws, the Government should provide an adequate water supply for the Indians in question, either by purchase of valid rights, or the construction of storage reservoirs, or the impounding of flood or surplus waters, such purchase of rights or storage reservoir construction to be paid for out of gratuity appropriations. Any other course, in our opinion, would be penalizing the rights of private citizens for the failure of the Government to properly protect the Indian and his water rights." *Id.*

This aspect of the decision in *New Mexico* came to be called the "sensitivity doctrine" below.[13]

The circumstances of this case fall squarely within *New Mexico*. The 1905 Act is a classical example of Congress' express deference to state law respecting the allocation of water.[14] The mandate of the Act was obeyed by the Indian Service (now the BIA) which acquired Wyoming water rights for the Indians to irrigate 145,000 acres of the Reservation, or approximately 44,000 acres more than were classified as practicably irrigable below. During the same era, in part to comply with the land disposition laws of the United States, the non-Indian predecessors of these cross-petitioners also asquired water rights under Wyoming law, many to irrigate lands of the Reservation opened to them under the same 1905 Act. Both the master and the initial decision of the district court found that the reserved water right would severely

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[13] The term "sensitivity doctrine" arises from Justice Powell's partial dissent in *New Mexico*. Justice Powell, and the Justices joining with him, agreed with the majority that "the implied-reservation doctrine should be applied with sensitivity to its impact upon those who obtain water rights under state law and to Congress' general policy of deference to state water law." *United States v. New Mexico*, 438 U.S. at 718. Indeed, all nine Justices agreed that the effect of the quantification of a reserved water right upon state water users should be weighed with deference to the extent of the impact and to Congress' general policy of deference to state water law.

[14] The 1905 Act was in part a response to concerns that water rights of the Reservation were insufficiently protected. That concern was expressed by the Indians themselves in the negotiations leading to the April 21, 1904, agreement which the 1905 Act confirmed. Wyo. Ex. WRIR I&P 8, at 19. It had been expressed even earlier with extreme urgency by officials charged with administration of the Reservation who demanded immediate action to secure the water rights of the Reservation under Wyoming law. *See* Wyo. Ex. WRIR I&P 42-47, 49-50, 52, Congress' response in the 1905 Act, consistent with the concerns previously expressed, was to provide for securing the Reservation water rights under Wyoming law and to dedicate a portion of the proceeds from sale of the ceded lands of the Reservation to that task.

damage those non-Indian water rights. Although each struggled with *New Mexico*'s proper application [15] within this historical setting, both the master and initial district court decision, guided by the sensitivity doctrine, required that the Tribes' implementation of the reserved water right for the future projects be preceded by construction of storage to prevent injury to non-Indian users [16] from the future projects.[17]

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[15] Though *New Mexico* was intended to restate the existing law of Federal reserved water rights there has resulted much consternation with respect to its proper application and scope. In *Colville Conferated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981), the Ninth Circuit Court of Appeals unhesitatingly applied the principles of *New Mexico* in quantifying a reserved water right for the Colville Reservation. Just two years later, in *United States v. Adair*, 723 F.2d 1394, 1408 (9th Cir. 1983) *cert. denied sub nom. Oregon v. United States*, 467 U.S. 1252 (1984), the same court ruled that *New Mexico* was not directly applicable to *Winters* doctrine rights on Indian reservations, while nevertheless relying upon *New Mexico* as establishing guidelines for the quantification of Indian reserved rights. Disagreement as to *New Mexico*'s applicability also appears among the commentators. *See*, for example: Cohen, *Handbook of Federal Indian Law* (1982), 581-585; Schapiro, *An Argument for the Marketability of Indian Reserved Water Rights: Tapping the Untapped Reservoir*, 23 Idaho Law Review 277, 281; Isham, *Colville Confederated Tribes v. Walton: Indian Water Rights and Regulation in the Ninth Circuit*, 43 Montana Law Review 247, 251-252; Shrago, *Emerging Indian Water Rights: An Analysis of Recent Judicial and Legislative Developments*, 26 Rocky Mountain Mineral Law Institute 1105, 1133-1143.

[16] Interestingly, protection of state water rights from the damaging effects of reserved water rights by the construction of storage had been recommended 52 years earlier. *See* Preston and Engle, at 2213, note 12, *supra*.

[17] The master accepted what he described as "a small, certain amount of evidence" of the effect of the claimed reserved right upon state and private users. Wyoming Petition App. H, at 630a. Based upon that evidence, the master ruled that the reserved right would inevitably damage the water rights of non-Indians. *Id.* at 629a and 688a through 690a, Finding of Fact I.12. The master therefore limited the Tribes' development of their future projects to no more than 10% of the total future project reserved right in each decade after the decree unless storage facilities were in place

The Wyoming Supreme Court, which merely assumed that *New Mexico* should apply in an Indian reserved water right case, refused to impose even the limited storage requirement crafted by the district court. Wyoming Petition App. A, at 70a-71a. In addition, despite the teachings of *New Mexico* and despite the master's and district court's findings regarding the disastrous effect of the reserved water right awarded below, the Wyoming Supreme Court did not even consider as factors in its quantification of the reserved right (1) Congresss' deference to state law in the 1905 Act, (2) the acquisition of sound and ample state water rights for the Tribes under the Act, (3) the replacement of those state water rights by an unnecessary reserved right bearing an 1868 priority date, or (4) the damaging gallon for gallon effect of that replacement upon non-Indian water users nearly 80 years after their predecessors watched the United States vigorously observe the 1905 Act. Instead, in utter disregard of the proof, the court claimed that no gallon for gallon reduction would occur if the storage requirement were eliminated [18] and incorrectly ruled that sufficient

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to provide all water necessary for the needs of Indian and non-Indian users. *Id.*, at 584a, 626a-627a. The district court initially agreed with the master's finding that state and private water users would be damaged by the reserved water right. Wyoming Petition App. F, at 258a, Finding of Fact 98. Based upon that finding, the district court prohibited construction of any Indian future project until such time as storage facilities were in place to provide all water needed by non-Indian users. Wyoming Petition App. F, at 235a-236a. Upon hearing of post-trial motions, however, the storage protection was eliminated, as was finding 98. Wyoming Petition App. D, at 169a and Wyoming Petition App. E, at 194a-199a. Elimination of finding 98 was remarkable in that no party had asked for its elimination, no party had presented evidence supporting its deletion upon rehearing, and its deletion was inconsistent with the unchallenged, and more extensive, findings of the master upon which the district court had originally relied to craft finding 98.

[18] Wyoming Petition App. A, at 71a. The magnitude of a reserved water right's harm is enhanced by the apparent flexibility of the water right. For example, though quantified for irrigation purposes, it appears that the Tribes' reserved right is subject to a

sensitivity to the needs of state and private water users had been shown by its narrow construction of the Reservation's purpose, its rejection of some 50,000 acres originally claimed as PIA, and its imposition of a higher water use efficiency than the United States and Tribes had originally proposed.

In the face of the evidence and applicable law, the Wyoming Supreme Court misapplied *New Mexico* in at least four fundamental ways. First, the Wyoming Supreme Court merely assumed the application of *New Mexico* to Indian reserved water right cases, even though this Court expressly relied upon both *Winters v. United States*, 207 U.S. 564 (1908) and *Arizona v. California*, 373 U.S. 546 (1963) in carefully circumscribing the standards by which reserved water rights would be quantified. *New Mexico*, 438 U.S. at 700, note 4, and the accompanying text.[19]

Second, despite *New Mexico*'s admonition that the reserved water right doctrine should be applied with sensitivity because of Congress' general policy of deference to state water law, the Wyoming Supreme Court gave no consideration to the effect of the 1905 Act upon the proper quantity of water to be reserved for the Reservation. The Wyoming Supreme Court never even addressed the issue of whether the water rights acquired under direction of the 1905 Act meet Reservation purposes with-

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variety of other uses to which the Tribes may elect to apply it. *Arizona v. California*, 439 U.S. 419 (1979). Should the Tribes be allowed to convert a portion of this irrigation water right to, for example, instream flows, its effect upon state-awarded water rights may be measurably increased. The Tribes have already notified the Wyoming State Engineer of their intent to do so. As described by the Wyoming Petition, the Tribes' plans may violate the primary/secondary purpose distinction of *New Mexico*, 438 U.S. at 702. Wyoming Petition, note 30 and accompanying text.

[19] Any doubt as to *New Mexico*'s applicability to Indian reserved water right cases should finally have been dispelled by this Court's reliance upon *New Mexico* in *Arizona v. California*, 460 U.S. 605, 621 (1983).

out the implication of the largely redundant reserved water right or whether the quantification of the reserved water right should be limited because of Congress' express deference to state water law on this Reservation. It is impossible to reconcile the Wyoming Supreme Court's inaction with this Court's direction that Congress' deference to state law must be weighed in the quantification of a reserved water right when such will result in a reduction of supplies to water-needy state and private appropriators.

Third, the Wyoming Supreme Court held that it had complied with *New Mexico* by narrowly drawing the Reservation purpose, by reducing the claimed PIA, and by imposing a water use efficiency requirement higher than had been originally claimed by the Tribes and the United States. In doing so, however, the court was merely affirming the findings of the district court on these independent legal and factual issues, each of which is unrelated to the sensitivity doctrine. As a result, the Wyoming Supreme Court's decision leaves the unfortunate implication that the sensitivity doctrine is intended as an excuse to modify the evidence or to alter a proper factual or legal conclusion in order to limit a reserved water right rather than as an equitable device to protect state water users *after* the facts and law have been correctly applied.

Fourth, the Wyoming courts misapplied *New Mexico* in offering protection to non-Indian water users only as against development of the future projects. As the Master below found, in a finding that remains undisturbed, "owners of water rights in Division 3 may suffer damages from an inability to put their rights to full use following the emplacement of an 1868 priority date for Indians in the upper reaches of the Wind River." [20] Hence, it is not only the construction of new projects which will damage state water users, but also the replacement, by the 1868

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[20] Wyoming Petition App. H, at 688a, Finding of Fact I.2.

reserved water right,[21] of congressionally-required and fully satisfactory state-awarded water rights obtained at the direction of the 1905 Act.

The Wyoming Supreme Court's misapplication of *New Mexico* is placed even more clearly into perspective by the decision in *Arizona v. California*, 460 U.S. 605 (1983), in which this Court refused to requantify existing Indian reserved water rights when doing so would disrupt the certainty of previously-settled state water rights and result in a gallon for gallon reduction in the amount of water available for state and private appropriators. *Arizona v. California*, 460 U.S. at 620-621 (1983). In the Big Horn Basin, by the 1905 Act and the land disposition acts, Congress created certainty and security for the water rights of Indians and non-Indians alike by requiring all water users to rely upon Wyoming law. Today, the Wyoming Supreme Court would displace the water rights of non-Indians by replacing and requantifying the Indians' Wyoming water rights with an 1868 reserved right. Yet the Wyoming Supreme Court could find no way to apply the protections developed by this Court in *New Mexico*.

This is a case in which the findings below demonstrate that there will be a gallon for gallon reduction in water available to state and private water users as a result of the quantification of a Federal reserved water right. It is a case in which Congress expressly deferred to state law to establish water rights for the Reservation. It is a case in which the certainty and reliability of vested water rights of state and private appropriators will be radically upset in order to enhance the Tribes' position by replacing sound Wyoming water rights for the Reservation with a larger, more senior and perpetual reserved water right. This Court should accept certiorari to clarify application of the sensitivity doctrine, to define its scope, and to correct the Wyoming Supreme Court's refusal properly to consider *New Mexico* in this case.

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[21] *See also*, note 9, *supra*.

II. The Wyoming Supreme Court Failed To Apply The Congressionally-Mandated Discount Rate In Determining The Federal Reserved Water Right For Future Irrigation Projects For The Reservation.

The Wyoming Supreme Court, like the lower courts, quantified the Reservation's reserved water right to serve the agricultural needs of the practicably irrigable acres ("PIA") of the Reservation. Its determination therefore required that it identify those lands on the Reservation susceptible to sustained irrigation at reasonable costs.[22] Roughly 48% of those lands have never been irrigated, but were included in future irrigation projects designed solely for this adjudication for the purpose of quantifying the reserved water right. *See* Wyoming Petition App. A, at 84a.

In determining the economic reasonableness of the future projects under the PIA test, the Wyoming Supreme Court was required to select and apply the proper long-term discount rate as one standard by which the economic feasibility of the projects would be measured. The Wyoming Supreme Court, as did the district court, applied a discount rate of 4%. Wyoming Petition App. A, at 54a. In so doing, however, the Wyoming Supreme Court ignored Congress' directive that the discount rate to be used for the formulation and evaluation of Federal water and related land resource projects, including these Indian future projects, was 7-1/8%. This Court should accept certiorari to apply the Congressionally-mandated discount rate ignored by the Wyoming courts.

Congress has ordered that the discount rate formula for the formulation and evaluation of Federal water projects shall be as annually set forth in the "Policies, Standards and Procedures in the Formulation, Evaluation and Review of Plans for Use and Development of Water and

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[22] Early in the litigation, Wyoming, the Tribes and the United States agreed upon the definition of practicably irrigable acreage to be applied in the case. PIA were "those acres susceptible to sustained irrigation at reasonable costs."

Related Land Use Resources." 42 U.S.C. § 1962d-17(a). Congress has assigned the responsibility for the determination of the proper discount rate to the Water Resources Council which publishes the discount rate annually in the Federal Register. For 1979, the year to which values relied upon herein were referenced, the Water Resources Council set the discount rate to be used in the formulation and evaluation of Federal water resources projects at 7-1/8%.[23]

At trial herein, both sides agreed that no future project proposed by the United States for the Reservation was feasible at the Congressionally-mandated discount rate of 7-1/8%. *See* Wyo. Ex. WRIR ED-100 and U.S. Ex. WRIR C-274.[24] As to the fact that the future projects would be financed by the United States, there was also no disagreement. The evidence below, as testified by an expert economist for the United States, was that use of the prime rate in the economic analysis of the future projects was inappropriate since "[i]n these kinds of projects you don't use prime rate because the source of the money is the Federal Government and their long-term rate is more appropriate." Tr. 5078. The "long-term rate" is, of course, the criterion used by the Water Resources Council in formulating its discount rate.

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[23] The discount rate applied by the Water Resources Council has steadily risen since 1979. The discount rate for application for fiscal year 1988 is 8-5/8%. *See* 52 Federal Register 46687, December 9, 1987. At no time since 1979 has the Council's discount rate ever been lower than 7-1/8% and, indeed, it has never since been as low as 7-1/8%.

[24] While these exhibits agreed in their conclusions, they were offered for radically different purposes. Wyoming offered its exhibit to show that no future project was feasible at 7-1/8% and that therefore no decree awarding reserved rights for future projects should be granted. To the contrary, the United States offered its exhibit to show that, in spite of the Congressionally-mandated discount rate, the court should accept a lower discount rate so that the future projects could be justified.

Hence, though the evidence below was uncontradicted that the Federal Government would finance the Reservation's future projects and though the Congressionally-mandated discount rate was 7-1/8%, the Wyoming Supreme Court approved the lower court's application of a discount rate of 4% to justify the massive reserved water right awarded for future projects on the Reservation. In so doing, the Wyoming Supreme Court relied upon the testimony of experts for the United States who opined that a discount rate lower than 7-1/8% should be used, but none of whom disagreed that the Water Resources Council's discount rate was, at the pertinent time, other than 7-1/8%.[25] Consequently, the court ignored Federal law.[26] This Court should grant certiorari to establish the

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[25] In a remarkably disingenuous portion of its opinion, the Wyoming Supreme Court relied upon the fact that the Wyoming's economist, Dr. Brookshire, testified that a range of discount rates of 4%-11% should be applied in this case. Wyoming Petition App. A, at 54a. What the Supreme Court failed to mention was that the master had refused to be limited by the Water Resources Council's determination of discount rate and that Dr. Brookshire consequently applied the range stated above. At no time, however, did Dr. Brookshire or anyone else with Wyoming or any of the cross-petitioners acknowledge that the discount rate to be applied should be anything other than 7-1/8%.

[26] The real basis for the decision below seems to be what the courts perceived as the utter necessity of finding a way to justify an award of a reserved water right for future projects. The Wyoming Supreme Court was significantly divided (3-2) on this issue. While the majority opined that 4% was the proper rate, thereby justifying the future projects, Justice Thomas, writing for the dissent, stated that he "would be appalled as most other concerned citizens should be, if the Congress of the United States, or any other governmental body, began expending money to develop water projects for irrigating these Wyoming lands when far more fertile lands in the midwestern states now are being removed from production due to poor market conditions." Wyoming Petition App. A, at 84a. Justice Thomas went on to describe the Indian future projects as no more than "irrigable academically." *Id.* The master seemed even more concerned than the Wyoming Supreme Court by the possibility that no future project would be feasible if he were

proper Federal standard for the discount rate for determination of the practicably irrigable acreage in the reserved water right context.[27]

III. The Decision Of The Wyoming Supreme Court Regarding The Water Rights Of Non-Indian Successors To Indian Allottees Is In Conflict With The Decisions Of The Ninth Circuit Court Of Appeals.

Several successors in interest to Indian allottees within the Reservation claimed a portion of the Reservation's reserved water right based upon their successor status. Though the master and the district court had rejected the claims of the allottees' successors, the Wyoming Supreme Court held that non-Indian successors to allotted lands are entitled to a portion of the reserved water right quantified for the Reservation, and remanded to the district court with instructions that allottees' successors "must be awarded a reserved water right with an 1868 priority date where the PIA they can show were irrigated by their Indian predecessors or put under irrigation within a reasonable time thereafter." Wyoming Pe-

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to apply the 7-1/8% discount rate. On the one hand, the Master expressed shock at Wyoming's contention that "not a single acre of the future lands claimed is economically feasible." Wyoming Petition App. H, at 579a. In spite of his professed disagreement with this concept, however, the master also stated that: As it is now, it appears that no matter what benefit-cost ratios are arrived at, or discount figure used, in the real world of today's interest and inflation and uncertainty in agriculture, doubt exists that much of the 'futures' land may ever be a part of any newly constructed irrigation project." *Id.* at 584a.

[27] The Wyoming Supreme Court's decision to ignore that statutory discount rate is also inconsistent with at least one decision of the Tenth Circuit Court of Appeals. *Johnston v. Davis*, 698 F.2d 1088 (10th Cir. 1983). In *Johnston*, the court concluded that Congress intended broad application of the discount rate formula by requiring its application in general terms at 42 U.S.C. § 1962d-17. *Id.*, 698 F.2d at 1092. In spite of Congress' intent broadly to apply the formula, and without any stated rational basis in its opinion, the Wyoming Supreme Court rejected application of the statute in this case.

tition App. A, at 72a-75a.[28] The Wyoming Supreme Court's remand unfortunately conflicts with the standards enunciated by the Ninth Circuit Court of Appeals in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981), *cert. denied*, 475 U.S. 1010 (1986). This Court should accept certiorari to resolve that conflict.[29]

There exists a lengthy judicial history regarding the rights of non-Indian successors to Indian allottees within a reservation. The issue was confronted as long ago as 1928 in *United States v. Hibner*, 27 F.2d 909 (D. Idaho 1928) and was addressed, though without definition as to the scope or extent of the right, by this Court in *United States v. Powers*, 305 U.S. 527 (1939). In 1981, however, the Ninth Circuit Court of Appeals for the first time described the scope of the right conveyed to Indian allottees' grantees in *Colville Confederated Tribes v. Walton*. In *Colville*, the Ninth Circuit, relying upon *United States v. Hibner*, ruled that an allottee's successor is entitled to a water right with a priority as of the date of creation of the Reservation for water being appropriated by the Indian allottee at the time title passes and to water appropriated by the non-Indian successor with reasonable diligence after the passage of title, *so long as* the full measure of the reserved water right acquired by the

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[28] As explained by the Wyoming Petition, at note 7, and accompanying text, this remand does not prevent this Court from accepting certiorari.

[29] The issue sought to be reviewed by these cross-petitoners with respect to the rights of allottee's successors is conceptually akin, but not identical, to that raised by the Wyoming Petition at § III.C., page 29. Wyoming seeks certiorari on the issue of the proper priority of an Indian reserved right for lands reacquired by the Tribes from a non-Indian successor to an allottee. The cross-petitioners seek this Court's review of whether or not a non-Indian successor to an allottee may maintain a portion of the reserved water right obtained from the allottee without showing continuous beneficial use from the time of acquisition.

successor is maintained by continued use and not lost by non-use.[30]

In its decision, the Wyoming Supreme Court recognized the rights of allottees' grantees without applying the *Colville* court's limitation that failure to continue use of the water right acquired by the non-Indian grantee would result in its abandonment. Hence, in its remand to the district court, the Wyoming Supreme Court required only that the court establish the inception of such rights but did not order that the district court determine whether or not any such rights had been maintained by continuous use. The court's order is, therefore, in conflict with the Ninth Circuit Court of Appeals in *Colville Confederated Tribes v. Walton.*

This Court should grant certiorari to resolve the conflict between the Ninth Circuit Court of Appeals and the Wyoming Supreme Court and to rule that successors to Indian allottees may rely upon water rights acquired from allottees only if they have maintained such rights with their continuous and uninterrupted use.

IV. The Wyoming Supreme Court's Determination That The United States Was Not Estopped From Claiming A Reserved Water Right To The Detriment Of State And Private Water Users Misapplies The Decisions Of This Court And Is In Conflict With The Decisions Of The Circuit Courts Of Appeals.

This Court has, on more than one occasion, refused flatly to rule that estoppel may not under any circumstances be applied against the United States. *See Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). While the Court has assuredly im-

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[30] The fact a non-Indian successor to the reserved water right may abandon that water right by non-use is one of the crucial distinctions between the reserved right on behalf of Indians and that which may be acquired by non-Indians. *See Colville Confederated Tribes v. Walton*, 647 F.2d at 51.

posed a heavy burden upon those who would assert estoppel against the government, the Court also has indicated that when a private party is deprived of a thing to which he is entitled as of right,[31] when a new rule is applied retroactively in a way which intrudes upon a party's interests,[32] or when the conduct giving rise to the estoppel is that of the general government acting by Congress itself, and not merely that of its agents,[33] then estoppel may apply against the government.

This Court has also discussed, in its opinions on the estoppel issue, whether or not, in addition to proving the commonly accepted bases for the application of equitable estoppel,[34] one must also show the government's affirmative misconduct to work an estoppel against it. This Court has neither required nor dismissed the need for such a showing,[35] though certain lower Federal courts have imposed that requirement upon parties complaining

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[31] *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). *See also Moser v. United States*, 341 U.S. 41 (1951).

[32] *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). *See also NLRB v. Bell AeroSpace Co.*, 416 U.S. 267 (1974); *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800 (1973); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

[33] *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 (1984).

[34] In *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, at 59, this Court stated that the party claiming estoppel must show that it has relied on its adversary's conduct in such a manner as to change its position for the worse, that the reliance must have been reasonable and that the party claiming estoppel did not know nor should it have known that its adversary's conduct was misleading.

[35] *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *Schweiker v. Hansen*, 451 U.S. 1032 (1981).

of governmental duplicity, at least when the United States acts by its agents, rather than by Congress itself.[36]

These cross-petitioners have asserted throughout that, whether affirmative misconduct is or is not an element of estoppel in this case, it is a proper case in which to estop the United States from claiming a Federal reserved water right which will damage the water rights of state and private parties acquired with the support and at the direction of the United States. The Wyoming Supreme Court disagreed, however, and rejected application of equitable estoppel on the sole basis that the United States' affirmative misconduct had not been proved. Wyoming Petition App. A, at 22a-23a. This Court, to clarify whether equitable estoppel may be applied against the United States and, if so, whether it must be based upon a showing of affirmative misconduct, and to correct the harsh and unjust application of the Federal reserved right doctrine below should grant certiorari. This is a case fundamentally well-suited to resolve these issues, since the estoppel merited by the facts herein results not from the random acts of minor governmental functionaries but from the policies of the United States established by Congress itself.[37]

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[36] *See*, for example, *Lavin v. Marsh*, 644 F.2d 1378 (9th Cir. 1981), holding that a party claiming estoppel against the government must show affirmative misconduct as opposed to a mere failure to inform or assist, 644 F.2d at 1382, and appearing to demand a pattern of false promises rather than mere negligence on the part of the government to invoke estoppel. 644 F.2d at 1383. *See also Green v. United States Department of Labor*, 775 F.2d 964 (8th Cir. 1985); *United States v. River Coal Co.*, 748 F.2d 1103 (6th Cir. 1984).

[37] In *Heckler*, 467 U.S. at 60, this Court again expressed the view that to estop the government based upon the conduct of its agents is to undermine the interests of the citizenry as a whole in obedience to the rule of law. This concern has no bearing in a case such as this in which the conduct of the sovereign itself is called into question.

Though the Wyoming Supreme Court did conclude that a showing of affirmative misconduct had not been made below, it did not disturb, and in fact endorsed, certain of the findings below which were the basis of the district court's application of estoppel. Wyoming Petition App. A, at 23a.[38] The district court found that Congress had acknowledged, in the various land disposition statutes under which settlement proceeded, its awareness that water was necessary for successful settlement of the arid lands of the west and had acceeded to prior appropriation as the means to secure such water. Wyoming Petition App. F, 259a-260a, Findings of Fact 107-110. *See also* Wyoming Petition App. H, at 628a-629a and 688a-689a, Findings of Fact I.3.-I.6. and Wyoming Petition App. A, at 23a. Indeed, the evidence below revealed that Congress not only recognized the importance of water in its land disposal acts, but that it demanded proof of a secure water supply before it would allow a land patent to issue to western homesteaders.[39]

The evidence below also revealed that Congress' inducement to pioneer families to settle the western lands, through the land disposition acts, was remarkably successful within Wyoming's Water Division 3. Wyoming Petition App. F, at 259a-260a, Findings of Fact 106-112. *See also* Wyoming Petition App. H, at 624a. The district court found that over 250,000 acres of land in Water Division 3 were productively settled by the predecessors in interest to the private parties in this adjudication. Wyoming Petition App. F, at 260a, Finding of

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[38] The estoppel doctrine was applied by Judge Joffe in his ruling appearing at Wyoming Petition App. F, at 230a-237a, *et seq.* Judge Johnson, who was appointed after Judge Joffe's retirement following the taking of all the evidence in the case, overturned Judge Joffe's ruling on the basis that no affirmative misconduct had been shown on the part of the United States. Wyoming Petition App. E, at 196a.

[39] *See* notes 2 and 4, *supra*.

Fact 111. *See also* Wyoming Petition App. H, at 629a. At the same time that non-Indian settlement was speedily proceeding in the Big Horn Basin under the land disposition laws, Congress enacted the 1905 Act which advertised to the world that the water rights for the Reservation would, like those of non-Indians, be obtained in accordance with Wyoming law.[40]

Finally, the effect of the Federal reserved water right awarded below is well documented. Both the master and the initial district court ruling unequivocally ruled that the reserved water right awarded would severely dimish preexisting water rights of state and private parties. Wyoming Petition App. H, at 688a-690a, Findings of Fact I.1. through I.12.; Wyoming Petition App. F, at 258a, Finding of Fact 98.

Under these circumstances, a failure to apply estoppel misapplies the decisions of this Court which have permitted its application against the United States under proper circumstances. First, it is established that the reserved water right implied below will severely damage the vested water rights to which these cross-petitioners and their predecessors have been entitled and have relied upon for nearly 100 years. Second, application of the reserved right doctrine at this late date on the Res-

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[40] It is not difficult to imagine how the settlement of the West would have been affected had the ancestors of these cross-petitioners and other pioneers known that vast amounts of the water appropriated by them under state law had previously been reserved to the use of the many Indian tribes scattered throughout the West. As Preston and Engle, note 12, *supra*, at 2231-2232, commented: "Had the *Winters* decision been promulgated in 1848 instead of 1908, it would have effectually barred the settlement and development of much of the arid regions of the West, as in that case the pioneer, knowing that there was a probability that at some time he would be required to relinquish his water supply to the Indians, would have had little or no incentive to build irrigation systems and place the land under cultivation."

ervation applies a new rule, contrary to the 1905 Act, for the establishment of water rights on the Reservation which will damage these cross-petitioners. Finally, the land disposition acts, which induced the predecessors of these cross-petitioners to settle the dry western territories of this country, were not the unlawful act of a minor official or agent of the government, but were instead the coordinated policy of the United States as enacted into law by Congress.

The Wyoming Supreme Court's failure to apply estoppel is also inconsistent with the decisions of the several courts of appeal which have found the necessity for affirmative misconduct as an element of estoppel against the United States. *See*, for example, *Lavin v. Marsh*, 644 F.2d 1378 (9th Cir. 1981). If, as required by *Lavin*, a pattern of false promises on the part of the government is required to invoke estoppel, such is present in the assurances of the Federal Government that water would be available to settlers on the public lands of the Big Horn Basin under the laws of Wyoming and that the water rights of the Reservation, like those of non-Indians, would be obtained under the auspices of that same law. To permit the United States now to ignore its promises to the non-Indian settlers of the Basin in order to claim a reserved water right for the Reservation which is largely duplicative of that already securely established by permit under Wyoming law would undermine the "minimum standards of decency, honor, and reliability" which citizens may expect in dealing with their government. *Heckler v. Community Health Services of Crawford County, Inc.*, 409 U.S. at 60-61.[41]

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[41] The master noted, as he struggled with application of the doctrine of estoppel below, that "the United States is duty bound to compensate those who will be harmed." Wyoming Petition App. H, at 626a. The master's statement is almost identical to Preston and Engle's report to Congress in 1928 in which they recommended that "in making practical application of this [*Winters*] principle, the

For these reasons, this Court should accept certiorari herein in order to clarify the application of the doctrine of estoppel as it may work against the United States and to conclude that the doctrine may properly be applied on the facts herein.

CONCLUSION

For the reasons stated above, these cross-petitioners respectfully request the order of this Court granting this petition for writ of certiorari to the Supreme Court of the State of Wyoming.

Respectfully submitted,

DONALD P. WHITE *
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(307) 856-2207

C. EDWARD WEBSTER, II
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RUTH CLARE YONKEE
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September 21, 1988

* Counsel of Record

Government, and not the pioneer, should stand whatever losses may result from the Government's failure to properly protect the Indians and their water rights. In our judgment, the government owes a duty to the pioneers, as well as to the Indians. It should be kept in mind that 'the winning of the West' is the work of the pioneer. The pioneers, acting upon the tacit, if not the express, invitation of the Government have subdued the western arid regions and made them habitable for man." Preston and Engle, note 12, *supra*, at 2231.

APPENDICES

APPENDIX A

August 2, 1988

Wind River Irrigation Project

Operational Guidelines—Crowheart Area

1. All water users will receive a delivery ratio of 1 cubic foot per second for each 70 acres of irrigated land.
2. After all lands receive the water described in (1) above the 1868 trust land water right will be met by increasing the 1:70 ratio as is appropriate for the available supply of water.
3. After the demands of the 1868 trust land right are met the balance of undelivered water will be distributed to the junior rights of the project.
4. It will be permissible to consolidate heads to increase flow, provided the consolidation *will not* exceed the total established delivery ratio for the heads involved.
5. As long as a water shortage exists, no deliveries will be made to stubble ground. Stubble ground with new seeding *will* receive water.
6. All non-Indian fee land with a possible 1868 right will be treated as a junior right, until that right is confirmed by the District Court.
7. All provisions of the 25 CFR 171 continue to apply. Particular attention must be directed at curtailment of water waste and all water must be put to beneficial use.
8. All headgates will be locked and operated only by Irrigation System Operators.

/s/ [Illegible]
Superintendent,
Wind River Agency

APPENDIX B

IN THE DISTRICT COURT
OF THE FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING

PETITION FOR TEMPORARY RESTRAINING ORDER AND INJUNCTION

COMES NOW Sky D. Phifer, Attorney for non-Indian water users on the Reservation, and hereby moves the Court for a Temporary Restraining Order and Injunction preventing the United States, through the Bureau of Indian Affairs, Department of the Interior, from applying an 1868 priority date to the Reservation and affirmatively states to the Court as follows:

1. Pursuant to a memorandum from the Billings Area Director to the Superintendent, Wind River Agency, the Superintendent is directed to honor the Indian reserved right claim using the priority date and amount in the adjudication. (See attached Exhibit A. "Memorandum.") Don Crook, acting Superintendent of the Wind River Agency, has informed Sky D. Phifer, Attorney, that beginning last Thursday, July 14th, they began to apply the 1868 priority date to the Crowheart area and turn off water to non-Indian users.

2. The decision by the BIA was erroneous for the following reasons:

a. The Supreme Court of the State of Wyoming issued its decision in this matter on February 24th, 1988 with the following Conclusion:

> The Amended Judgment and Decree is affirmed in part, reversed in part, and remanded to the District Court for further proceedings consistent with this opinion.

Rule 7.03 of the Wyoming Rules of Appellate Procedure provides: "When a judgment or final order is reversed, either in whole or in part, in the district court, or the Supreme Court the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the *court below for such judgment or such proceedings as the reviewing court may direct.*" (Emphasis added).

It is very clear from the conclusion of the Wyoming Supreme Court decision in this matter that the case is to be remanded back for a final decree to be entered by the District Court subsequent to the further proceedings set out in with the Supreme Court decision.

There further has been no decree or final judgment entered giving any particular parcel an 1868 priority date. All the decrees have done so far is to quantify the reserved right leading to an 1868 priority date leaving to further proceedings the actual judgment or decree which will provide an 1868 priority date for any particular parcel out on the Reservation, therefore, there is absolutely no basis for exercising a priority for any particular parcel out on the Reservation over another parcel.

b. As further grounds, the Shoshone tribe, the Arapahoe tribe, and the State of Wyoming, have all received extensions from the United States Supreme Court up to and including August 20th, 1988, to submit petitions to the United States Supreme Court for certiorari. Ob-

viously, these parties do not feel that this matter has been finally adjudicated.

c. Thirdly, the BIA at the Wind River Indian Reservation, has absolutely no way to measure the amount of water being delivered to any parcel on the reservation, so as to be able to implement an 1868 priority date in the proper amounts.

3. As is shown by the affidavits of Brad Eastman and Jim Fike, attached hereto made a part hereof, the non-Indians on the reservation stand to suffer immediate and irreparable injury if the status quo (meaning all water users on the Reservation being treated equally until final disposition of the water rights suit) is not maintained.

WHEREFORE the following relief is prayed for:

1. A Temporary Restraining Order restraining the Bureau of America from implementing or applying an 1868 priority date to the Reservation;

2. For an Order setting this matter for hearing on an Injunction preventing the Bureau of Indian Affairs, Department of Interior, United States of America from applying or implementing their 1868 priority date pending the final adjudication in this matter and implementation of a system of measurement on the irrigation projects on the Reservation.

DATED this 19th day of July, 1988.

/s/ Sky D Phifer
SKY D PHIFER
P.O. Box 1720
Lander, WY 82520
(307) 332-5743

CERTIFICATE OF SERVICE

I, Sky D Phifer, hereby certify that a true and correct copy of the foregoing Petition for Temporary Restraining Order and Injunction was served upon the following by placing the same in the United States mail, postage prepaid, and addressed to:

Donald P. White
White, White & Kennan, P.C.
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James Clear
Dept. of Justice
Land & Natural Resource Section
Indian Resources Section
P.O. Box 44378
Washington, D.C. 20026

Saul Goodman
1201 Penn Avenue N.W.
P.O. Box 7566
Washington, D.C. 20044

on this 19th day of July, 1988.

/s/ Sky D Phifer
SKY D PHIFER

EXHIBIT A

UNITED STATES GOVERNMENT
MEMORANDUM

Date: Jul. 6, 1988

Reply to Attn. of: Division of Programs, Water Resources, Code 380

Subject: Big Horn Adjudication

To: Superintendent, Wind River Agency

From: Billings Area Director

This memorandum will document the June 29, 1988, telephone conversation between Mr. Don Crook, Acting Superintendent, Wind River Agency, and Mr. Robert Delk, of my staff. We have discussed your concerns with Mr. James Clear from the Department of Justice (DOJ) and Mr. Richard Aldrich, Billings Field Solicitor. Both attorneys agree that there is nothing in the Wyoming Supreme Court decision to preclude the tribes from demanding their reserved water right immediately.

If the tribes make such a demand, you are directed to immediately honor the Indian reserved water right claim using the priority date and amount in the adjudication. We fully realize that the physical structure of the project makes this difficult, if not impossible. A water management plan is needed immediately as well as a long range plan to guide the operation of the project in the future.

We recommend a meeting in Billings on July 21, 1988, to develop a water plan for this year and an outline for a future operational plan. Suggested attendees at this meeting include the Wind River Superintendent, the Project Engineer, Area Office personnel, attorneys from the DOJ and the Office of the Solicitor and selected BIA personnel from other areas that have had experience with this issue.

We will inform you as soon as possible as to the time and place of the meeting.

/s/ Norris M. Cole

AFFIDAVIT

JAMES FIKE, being duly sworn under oath according to law, deposes and says:

1. That I am non-Indian and own the following described real property on the Wind River Indian Reservation which consists of two hundred ten (210) irrigated acres, towit:

> SE¼ NE¼, E½ SE¼ Section 22; S½ NW¼ NW¼, SW¼ NW¼, W½ SW¼, Section 23, Township 4 North, Range 4 West, W.R.M., Fremont County, Wyoming.

2. That I have five (5) headgates to this property.

3. On July 7th, 1988 my water was shut off on a normal rotation and should have been turned back on July 17th, 1988, but I was informed by BIA officials and ditch riders on July 14th, 1988 that my headgates would not be turned on because they were giving the water to Indian users and when the Indian users were satisfied they would turn on water to the non-Indian users.

4. There is thirty (30) acres of alfalfa and one hundred twenty (120) acres of irrigated pasture burning up and I will suffer irreparable damage if water is not delivered on the property within a very short period of time.

5. That I have sixty (60) acres planted in oats which I use for a fall hay crop and it is my practice to start irrigating that acreage now so that it will be ready to harvest in the fall. If I do not get water on these oats, I will suffer immediate and irreparable injury in that the crop will not have time to mature and I will lose between 150 ton of hay which my ranch operations cannot afford to lose.

6. On Monday, July 17th, 1988 the BIA delivered a head of water to me. But even with one head I could

only salvage my pasture and I would lose all my alfalfa and oat crops.

7. That I have not been given any reassurances that water will be delivered to me by BIA officials.

8. That there is no measurement system in use by the BIA irrigation office.

9. I have irrigated property for the last fifty (50) years on the Wind River Reservation.

10. I would normally run three (3) heads of water at this time and I feel that there is sufficient water on a rotation basis for all water users to produce their crops.

FURTHER AFFIANT SAYETH NOT.

/s/ James Fike, Sr.
JAMES FIKE

STATE OF WYOMING)
) ss
COUNTY OF FREMONT)

The foregoing Affidavit was subscribed and sworn to this 18th day of July, 1988, by the above named James Fike, known by me to be the person named as the Affiant.

(SEAL)

/s/ Sky D Phifer
Notary Public

My commission expires: 11/1/89

AFFIDAVIT

BRAD EASTMAN, being duly sworn under oath according to law, and says:

1. That I and my wife Mary Ann own the following described real property on the Wind River Indian Reservation consisting of approximately two hundred and nine irrigated acres, towit:

W½ SW¼, S½ SW¼ NW¼ Section 28:
N½ NW¼ NW¼ Section 33:
NW¼, S½ NE¼, Section 29
T4N, R3W W.R.M., Fremont County, Wyoming

2. That I am ranch manager for the following described real property on the Wind River Indian Reservation consisting of approximately five hundred irrigated acres owned by Robert L. and Jane G. Mitchell described as follows:

S½ of Lots 3 & 4, ALL of Lot 6, S½NW, SWNE, NWSE, N½SWSW, N½ N½SESW Section 4 T4N, R 4W:

Lot 3, S½NW, S½SE, NESW Section 24 T5N R5W, W.R.M. Fremont County, Wyoming.

3. As of July 14th, 1988 I was informed by Don Crook, acting Superintendent of the Wind River Indian Reservation, and Louis Twitchell who is in charge of BIA irrigation, that they were giving preference to Indians pursuant to an 1868 water right and shutting off all non-Indians. They then shut off all of the water to the company to which I manage for, Mr. & Mrs. Mitchell.

4. I was informed on July 18th, 1988 that each non-Indian was to get one head of water (head-gate) and that the ditch riders did in fact turn on one head-gate to both the property owned by me and my wife and the property owned by Mr. & Mrs. Mitchell.

5. One head is insufficient to irrigate my home property as I have nine (9) head-gates and I will suffer immediate and irreparable injury and that I will have to sacrifice half of my fields in order to irrigate the other half as one head of water is insufficient to irrigate my fields.

6. The Mitchell property consists of two separate holdings, with only one parcel up on the bench serviced by the Dinwoody Canal. The other parcel takes water directly from the river and so far has not been affected. The upper parcel up on the bench has been shut done to one head-gate of water and stands to have immediate and irreparable injury in that two of the three fields will have insufficient water and burn up under the present management and priority system established by the BIA. The one head of water goes for each non-Indian, whether or not that non-Indian owns ten acres or five hundred irrigated acres.

7. The BIA irrigation system has no way of measuring the amount of water delivery to any particular parcel. Even delivering one head of water to each non-Indian, varies because each head gate is of a different size and delivers a different quantity of water.

8. I've irrigated in the Crowheart area for the last thirteen years and in my opinion there is sufficient water, on a rotation basis which we have used in years past for everyone to get by without any fields burning up.

FURTHER AFFIANT SAYETH NOT.

/s/ Brad Eastman
BRAD EASTMAN

STATE OF WYOMING)
) ss
COUNTY OF FREMONT)

The foregoing Affidavit was subscribed and sworn to this 18th day of July, 1988, by the above named Brad Eastman, known by me to be the person named as the Affiant.

/s/ Sky D Phifer
Notary Public

My Commission Expires: 11/1/89

AFFIDAVIT

SKY D PHIFER, being duly sworn under oath according to law, deposes and says:

1. That I am attorney far various non-Indian owners of real property and irrigators on the Wind River Indian Reservation.

2. That I have been informed by Don Crook, acting Superintendent of the Wind River Indian Reservation, that pursuant to a memo he received from the Billings area director he was to begin applying an 1868 priority date to the Wind River Indian Reservation and that as of Thursday, July 14th, 1988 he began implementing an 1868 priority date in the Crowheart area of the Wind River Indian Reservation which involved delivery of water to Indian water users, and juggling whatever excess water there might be amongst the non-Indians, or in other words, begun to shut off non-Indian users.

3. Mr. Crook further informed me that there was no way of measurement in the ditches on the Wind River Reservation and so there was no way to implement the priority system on the Reservation with any degree of precision.

FURTHER AFFIANT SAYETH NOT dated this 19th, day of July, 1988.

/s/ Sky D Phifer

SKY D PHIFER
P.O. Box 1720
Lander, WY 82520
(307) 332-5743

STATE OF WYOMING)
) ss
COUNTY OF FREMONT)

Subscribed and sworn to this 19th day of July, 1988, by the above named Sky D Phifer, known to me to be the person named as the Affiant.

/s/ Betsy Gilman

IN THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT
STATE OF WYOMING

Civil No. 4993

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE BIG HORN RIVER SYSTEM AND ALL OTHER SOURCES, STATE OF WYOMING

CERTIFICATION

COMES NOW Sky D Phifer, attorney, and hereby certifies to the Court:

1. I contacted the attorney for the United States, the attorney for the Shoshone Tribe, the attorney for the State of Wyoming, and the acting Superintendent of the Wind River Indian Reservation on the 18th day of July, 1988 and told them of my intention to seek a Temporary Restraining Order on the 19th in front of Judge Hartman, Fifth Judicial District, State of Wyoming. I also attempted to get ahold of the attorney for the Arapahoe Tribe, but was unable to contact to him due to the lateness of the day and the time zone differences between here and Washington, D.C.

2. I was unable to tell any of the attornies which time I would be seeking the Temporary Restraining Order as I was unable to arrange a time with Judge Hartman on the 18th of July, 1988.

3. Further notice should not be required, as the attorney's for all major parties are spread out over the country with two in Washington D.C., one in Albuquerque, NM, and the other in Cheyenne, WY. I further was unable to arrange for a specific time upon which I would

be seeking the Temporary Restraining Order to inform the other parties.

4. Further the Temporary Restraining Order is necessary to prevent immediate and irreparable injury to the non-Indian water users on the Wind River Indian Reservation.

DATED this 19th day of July, 1988.

/s/ Sky D Phifer
SKY D PHIFER
P.O. Box 1720
Lander, WY 82520
(307) 332-5743

CERTIFICATE OF SERVICE

I, Sky D Phifer, hereby certify that a true and correct copy of the foregoing Certification was served upon the following by placing the same in the United States mail, postage prepaid, and addressed to:

Donald P. White
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P.O. Box 44378
Washington, D.C. 20026

Saul Goodman
1201 Penn Avenue N.W.
P.O. Box 7566
Washington, D.C. 20044

on this 19th day of July, 1988.

/s/ Sky D Phifer
SKY D PHIFER